

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



STATE OF OHIO

APPEAL NO. C-030948
TRIAL NO. B-9702196

Appellee,

Vs

ENTRY GRANTING LEAVE TO
APPEAL AND EXTENDING TIME

LOUIS MERRIWEATHER

Appellant,

This cause came on to be considered upon the PRO SE motions of the appellant filed herein for leave to appeal and for the appointment of counsel, and

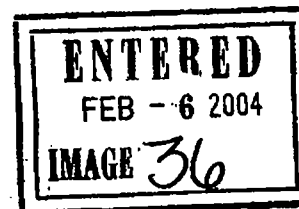
The Court, upon consideration thereof, finds that the motion for leave to appeal is well taken and is granted; however, the motion for the appointment of counsel is not well taken and is overruled.

Wherefore, upon consideration thereof, the appellant shall have until February 27, 2004 to file the docket statement.

To The Clerk:

Enter upon the Journal of the Court on 2/6/04 per order of the Court.

By: Rayon W. Winters (Copies sent to all counsel)
Presiding Judge



F

IN THE OHIO STATE COURT OF APPEALS
FOR HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT OF OHIO



D59906183

CASE NO.C-030948

STATE OF OHIO

Plaintiff-Appellee

vs.

LOUIS MERRIWEATHER

Defendant-Appellant

APPEAL FROM THEE DECISION OF
COMMON PLEAS COURT OF HAMILTON COUNTY
CRIMINAL DIVISON

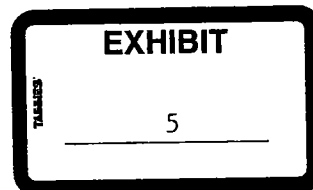
REVISED BRIEF OF APPELLANT LOUIS MERRIWEATHER

LOUIS MERRIWEATHER, #348-451
CHILLICOTHE CORRECTIONAL INSTITUTION
P.O.BOX 5500
CHILLICOTHE, OHIO 45601-0990
Defendant-Appellant In Pro-Se

FILED

2004 JUL 16 P 3:32

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH



FILED
COURT OF APPEALS

JUL 16 2004

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

G

TABLE OF CONTENTS
AND
ASSIGNMENT OF ERRORS

STATEMENT OF THE CASE PAGE

a)Procedural Posture.....	
b)Statement of Facts.....	

FIRST ASSIGNMENT OF ERROR(S).....1

(A) Presentence Investigative Report.....	1
(B)Psychiatric Evaluation Report.....	2

Trial counsel was ineffectived when he allowed trial court to sentence defendant without presentence investigative report and psychiatric evaluation report.

ISSUE(S) PRESENTED FOR REVIEW.....3

(1) When defense counsel's [Prommise(s)]to Appellant are broken,[Appellant's guilty pleas],which were based upon defense counsel's promise(s),were "not" voluntarily, willingly, knowingly and freely.

(2)When defense counsel failed to protect his promise(s),and to defend court ordered clinical evaluation,and PSI,defense counsel denied Appellant fundmental fairness at trial court proceeding,and denied Appellant due process protection,and rendered defense counsel's assistance ineffectived.

AUTHORITIES

State v.Dietz,89 O.App.3d.69,623 N.E.2d.613.....	1
U.S.v.Barrett,890 F.2d.855(6th.Cir.1989).....	1
U.S. v.Stevens,851 F.2d.140-143(6th.Cir.1988).....	1
U.S. v.Silverman,976 F.2d.1502(6th.Cir.1992).....	1
U.S. v.Herrera,928 F.2d.769(6th.Cir.1991).....	1
Alabama v.Smith,490 U.S.794,109 S.Ct.2201;104 L.Ed.2d.865(1989).....	1
Robert,455 U.S.at 556,100 S.Ct.1362.....	1
U.S.v.Evans,891 F.2d.686-688(8th.Cir.1989),cert.denied,848,U.S.1074,108 S.Ct.1047, ,98 L.Ed.1010(1988),cert.,denied,495 U.S.932,110 S.Ct.2170,109 L.Ed.499(1990)...	1

R.C. §2947.25(A).....	2
State v. Lee, 56 O.App.2d.57, 10 003d.64, 383 N.E.2d.342.....	2
Johnson v. Zerbst, 304 U.S.458, 468, 58 S.Ct.1019, 1025, 82 L.Ed.1461(1938).....	2
Brady v. U.S. 742, 758, 90 S.Ct.1463, 1474, 25 L.Ed.2d.747(1970).....	2
Godinez v. Moran, 113 S.Ct.at 2694.....	2
Drope, (1975), 420 U.S.at 176, 95 S.Ct.at 906.....	3
Jackson v. Indiana, 406 U.S.715, 739, 92 S.Ct.1845, 1858; 32 L.Ed.435(1972).....	3
Riggins, 504 U.S.at 142, 112 S.Ct.at 1818-1819(1992).....	3
Strickland, (1984), 466 U.S.at 693-698; 104 S.Ct.2052.....	3
Combs v. Coyle, 205 F2d.369 (2002).....	3
Lockhart v. Fretwell, 506 U.S.364, 372, 113 S.Ct.838, 122 L.Ed.2d.180(1993).....	3
SECOND ASSIGNMENT OF ERROR.....	3

Trial counsel was ineffectived, when he failed to protect defendant's appellate rights.

ISSUE PRESENTED FOR REVIEW.....	5
--	----------

When defense counsel failed to protect Appellant's appellate's rights, defense counsel's assistance was ineffectived and fell well below reasonably standards and denied Appellant "due process protect", under the 14th Amendment to the U.S. Constitution, and defense counsel's misconduct "adversely" affected Appellant's plea(s) and plea hearing outcome.

AUTHORITIES

Criminal Rule 11.....	4
State v. Buchanan, 43 O App.2d.93, 72 002 2d.307; 344 N.E.2d.503(1974).....	4
State v. Kelly, (1991), 57 Ohio St.3d.127, 129, 566 N.E.2d.658-600.....	4
Smith v. Robbins, 120 S.Ct.746, 772 (2002).....	4
Criminal Rule 32 (B)(2).....	5
R.C. §2953.05.....	5
Griffin v. Illinios, (1956), 351 U.S.12, 76 S.Ct.585, 100 L.Ed.891.....	5
Burns v. Ohio, (1959), 360 U.S.252, 79 S.Ct.1164, 3 L.Ed.2d.1209.....	5
Smith v. McMann, (1969), 417 F2d.648, 654, certiorani denied, 397 U.S.925, 90 S.Ct.929, 90 S.Ct.929, 25 L.Ed.105.....	5

LaChance v.Loudemill,470 U.S.532-542 (1985).....	5
Goodwin v.Cardwell,432 F2d.521,522-523(6th.Cir.1970).....	5
Lovelace v.Haskins,474 F2d.1254-1255,(1973).....	5
Swenson v.Boslen,(1967),386 U.S.258,at 260;87 S.Ct.at 997,18 L.Ed.2d.33.....	5

THIRD ASSIGNMENT OF ERROR.....6

Trial counsel was ineffective at sentencing by allowing trial court to impose maximum sentence without complying with sentencing guidelines.

ISSUE PRESENTED FOR REVIEW.....6

Defense counsel was ineffective in allowing trial court to impose maximum sentence without complying with sentencing guidelines,his assistance was not reasonably,and his ineffectiveness"adversely"affected Appellant's sentenc,and denied Appellant"due process protect".

AUTHORITIES

O.R.C. Section(s) §2929.11 through §2929.12(C),§2929.19(B)(2)(e) and §2929.14(C), with§2951.02(B).....	6
State v.Kershaw,132,Ohio App.3d.243(Hamilton Cty.1991),724 N.E.2d.1176.....	6
State v.Sheppard,(Hamilton,Cty.1997),124 Ohio App.3d.66;705 N.E.2d.411.....	6
State v.Comer,99 Ohio St.3d.463,793 N.E.2d.473.....	6
R.C. §2853.08 (A)(a).....	6

FOURTH ASSIGNMENT OF ERROR.....6

Trial counsel was ineffectived for allowing defendant to be classified a sexual predator without requisite hearing.

ISSUE PRESENTED FOR REVIEW.....7

Defense counsel was ineffectived in failing to object,when trial court failed to provide Appellant with a hearing under sexual predator guidelines,defense counsel's assistance was"not"within the bounds of reasonably,and"did not protect"Appellant's due process rights under R.C. §2950.09

AUTHORITIES

R.C. §2950.09(B)(1).....	7
State v.Eppinger,91 Ohio St.3d.158;743 N.E.2d.881(2000).....	7
State v.Cook,(1998),83 Ohio St.423-426.....	7

FIFTH ASSIGNMENT OF ERROR.....7

Trial court abused its' discretion in sentencing by not formally advising defendant of his appellate rights.

ISSUE PRESENTED FOR REVIEW.....8

Trial court abused its' discretion by not orally, directly formally advising Appellant of his appellate rights, trial court's abuse denied Appellant due process protection, and this abuse denied Appellant a fair and impartial trial court proceeding, and a right to direct appeal.

AUTHORITIES

Criminal Rule 32(B)(2), [Passim].....	5&7
State v. Sims, 272 N.E.2d at 88-89 (Ohio 1971).....	7
Evitts v. Lucey, 469 U.S. 387, 393 (1985).....	7
Douglas v. California, 372 U.S. 353, 356-57 (1963).....	7
Griffin v. Illinois, [Passim].....	5&8
Burkett v. Cunningham, 826 F.2d 1208, 1221 (8th Cir. 1987).....	8
Stephenson, 501 F.Supp. 840, 842 (M.D.N.C. 1981).....	8

SIXTH ASSIGNMENT OF ERROR.....8

Trial court abused its' discretion by not formally advising defendant of a hearing as provided by R.C. §2950.09 (B)(1).

ISSUE PRESENTED FOR REVIEW.....9

Trial court abused its' discretion and denied Appellant due process protection, by not formally providing Appellant a sexual predator hearing, with clear and convincing evidence before adjudicating Appellant a sexual predator.

AUTHORITIES

R.C. §2950.09 (B)(1), [Passim].....	7&8
State v. Eppinger, [Passim].....	7&8
R.C. §2050.01 (F).....	8
State v. Cook, [Passim].....	7&8

State v.Gowdy,(2000),88 Ohio St.3d.387,389,727 N.E.2d.579-589.....	8
Britt v.North Carolina,(1971),404 U.S.226,227,92 S.Ct.431-433;30 L.Ed.400-403.8	
Conclusion.....	9-10
Certificate of Service.....	10

PRIOR SUBMITTED EXHIBITS

IMAGE-241[Ordering probation investigation report]
 IMAGE-19 [May 16,1997]appointing CDTC for clinical examination]
 IMAGE-130 [entry waiver trial by jury
 IMAGE-124 [withdrawing guilty pleas May 15,1991
 IMAGE-124-A [the 4"is"altered,May 15,1997
 IMAGE-225[judgment entry,June 18,1997,Crim.Rule 32(A)(2) was not applicable at plea hearing in 1997.
 IMAGE-135,[April,26,1997,entry granting motion to dismiss defendant's request for transcripts.
 T.P.(1),March 21,2001,Request for view of presentencing investigation report to Hamilton County Probation Department.
 T.P.(2),ORINGIAL,respond from Hamilton County Prosecuting Office for request to view presentence report.
 T.P.(3),ORINGIAL,motion to dismiss request for transcripts,April 10,2001.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO

Plaintiff-Appellee

No.C-030948

-VS-

LOUIS MERRIWEATHER

Defendant-Appellant

REVISED BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

a) Procedural Posture

Defendant-Appellant, Louis Merriweather, was named in a four (4) count indictment returned by a Hamilton County Grand Jury, in April of 1997, alleging Appellant forced a minor girl child into sexual conduct [cunninlingus], in violation of R.C. §2907.02(A)(1). In less than 45 days from indictment, Appellant's defense counsel induced/coerced Appellant into pleading guilty to two (2) counts of the indictment on [promise(s)] from defense counsel, a maximum sentence of 10 years on each count, to run current to each other was imposed upon Appellant for his pleas, with sexual predator specifications to each count.

From the judgment of the trial court, Appellant Merriweather now appeals to this court.

STATEMENT OF THE FACTS

b) This is a classic case of she said, she heard. The state based its' arrest and charges on Kisha Parrish and Erica Parrish Black (Kisha is Erica's Aunt), who in the past

charged Appellant with raping her (kisha) on two difference alleged occasions in two (2) difference states. What the alleged victim does not tell the court and allow it to reflect in their charges is that on the morning of March 23,1997,and two days prior to the alleged offends,Kisha and the Appellant had voluntarily engaged in drugs and aclohol,including sexual acts of oral and intercourse personally with each other,at 1535 Pleasant St.in the county of Hamilton and the city of Cincinnati,prior to Kisha calling the police on the morning in question,and personally orally telling police that Kisha was a living resident of 1535 Pleasant St. There is "no" dispute that the minor child Erica was raped,[it is common knowledge with-in the immediate Black and Parrish family members],that Erica was raped months prior too the alleged complaints against Appellant,but,"not by Appellant".

FIRST ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE, WHEN HE ALLOWED TRIAL COURT TO SENTENCE APPELLANT WITH-OUT PRESENTENCE INVESTIGATIVE REPORT [PSI] AND PSYCHIATRIC EVALUATION [PE].

ARGUMENT[S]

Trial court documentations affirms that defendant [alleged] induced pleas too 2 counts of violation of R.C. § 2907.02(A)(1), on the promise(s) from defense counsel, promise(s) of presentence investigative report, [PSI] and psychiatric evaluation [PE]. [T.p. page 11, lines 10-15. However the PSI did not materialize, if one infact had, defendant was "not" permitted to personally review PSI in a reasonable time before sentencing to correct any misinformation, the PSI was court ordered, (T.p. page 11, lines 10-13). Defendant was entitled to access to PSI report in a reasonable time before sentencing. State v. Dietz, 89 O.App.3d.69, 623 N.E.2d.613, to correct any material misinformation. U.S. Barrett, 890 F.2d.855 (6th Cir.1989). The extent of a defendant's constitutional right is not "to be sentenced on the basis of invalid information". U.S.v. Stevens, 851 F.2d.140-143 (6th Cir.1988); U.S.v. Silverman, 976 F2d.1502 (6th Cir.1992). [A]ny information may be considered so long as it had "[sufficient indicia of reliability to support its accuracy]". U.S.v. Herrera, 928 F2d.769 (6th Cir.1991); Alabama v. Smith, 490 U.S.794, 109 S.Ct.2201, 104 L.Ed.2d.865 (1989). Sentence imposed on the basis of material misinformation under some circumstances, however, may violate due process. Robert, 455 U.S. at 556, 100 S.Ct.1362; U.S.v. Evans, 891 F2d.686-688 (8th Cir.1989), cert. denied, 848 U.S.1074, 108 S.Ct.1047, 98 L.Ed.2d.1010 (1988), cert. denied, 495 U.S.931, 110 S.Ct.2170, 109 L.Ed.2d.499 (1990). See also T.p. Image 241.

On the same day of May 15, 1997, in open court, the promise of psychiatric evaluation was made to defendant for defendant's induced pleas by defense counsel. [T.p. page 11, lines 10-15; T.p. page 13, lines 2-25; T.p. page 14, lines 1-25; T.p. page 15, lines 1-25; T.p. page 16, lines 1-5]. Defense counsel also gave trial court misinformation on defendant's suicide watch, T.p. page 13, lines 20-25; T.p. page 14, lines 1-7], and on the administration simultaneously of several different anti-psychotropic medication which had an adverse effect on defendant's mental state his will too knowingly enter into guilty plea agreement. [T.p. page 13, lines 1-25; T.p. page 14, lines 1-5]. This court ordered PE would have put to rest whether defendant was infact mentally competent to enter a guilty plea. Defense counsel promise was broken, [there was "no" court ordered PE as defense counsel promised], and defense counsel was ineffectived. [T.p. page 16, lines 11-22; T.p. Image 19]. Defense counsel's promise(s) to defendant was "not" in good faith", and his ineffectiveness was prejudicial toward defendant and a serious breach of trust between defense counsel and defendant. The presentence PE mandated by [former R.C. §2947.25(A)], is part of the sentencing process and "cannot" be waived by the defendant or his counsel. [A]ny sentence imposed with-out compliance with former R.C. §2947.25(A), is void. State v. Lee, 56 O.App.2d.57, 10 003d.64, 383 N.E.2d.342. Defense counsel should have maded reasonable investigation to assure that clincial examination was performed as defense counsel promised. "[A] criminal defendant may not waive his constiutional rights, his right to counsel or plead guilty unless he does so "competenly" and "intelligently". Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461 (1938). Brady v. U.S., 397 U.S. 742, 758, 90 S.Ct. 1463, 1474, 25 L.Ed. 2d. 747 (1970). Godinez v. Moran, 113 S.Ct. at 2694.

Drope, 420 U.S. at 176, 95 S.Ct. at 906. See also Jackson v. Indiana, 406 U.S. 715, 739, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972); Riggins, 504 U.S. at 142, 112 S.Ct. at 1818-1819 (1992). In order to show prejudice, defendant need only show that there is a reasonable probability that, but for counsel's errors, the fact finder would have had a reasonable doubt about defendant's guilt. Strickland, 466 U.S. at 693-698, 104 S.Ct. 2052. Combs v. Coyle, 205 F.2d 369 (6th Cir. 2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

ISSUE(S) PRESENTED FOR REVIEW

(1) WHEN DEFENSE COUNSEL'S PROMISE(S) TO APPELLANT ARE BROKEN, [APPELLANT'S GUILTY PLEAS], WHICH WERE BASED UPON DEFENSE COUNSEL'S PROMISE(S), WERE "NOT" VOLUNTARILY, WILLINGLY, KNOWINGLY AND FREELY.

(2) WHEN DEFENSE COUNSEL FAILED TO PROTECT HIS PROMISE(S), AND TO DEFEND COURT ORDERED CLINICAL EVALUATION, AND PSI, DEFENSE COUNSEL DENIED APPELLANT FUNDAMENTAL FAIRNESS AT TRIAL COURT PROCEEDING, AND DENIED APPELLANT DUE PROCESS PROTECTION, AND RENDERED DEFENSE COUNSEL'S ASSISTANCE INEFFECTIVE.

SECOND ASSIGNMENT OF ERROR

Trial counsel was ineffective, when he failed to protect defendant's appellate rights.

ARGUMENT

At plea hearing of May 15, 1997, in open court the guilty plea agreement(s) were presented to defendant, defendant affirms his signature. [T.p. page 7, lines 14-21], however defendant's personal

signature"does not"appear on,T.p.Image 124,defendant's signature appears on T.p.page Image 124A;[T.p.page 8,lines 19-25;T.p.page 9, lines 1-25;T.p.page 10,lines 1-17]. The court transcript of May 15,1997,is"silent"as too trial court or defense counsel orally,directly adhereing to criminnial rule 11;**Criminal Rule 11**,is concern with a defendant's rights upon entering a plea and also sets forth the procedure to be followed when such plea is taken.Criminal Rule 11,includes all of the defendant's constitutional rights as stated in the fifth and sixth amendments of the U.S.Constitution.In order for a plea of guilty to be valid in a felony case"**all**"of the the procedural requirements of Criminal R.11,"**must**" be scrupulously adhere too,otherwise,the quilty plea is void.State v.Buchanan,43 O. App.2d.93,72 002 2d.307,344 N.E.2d.503,(1974).It was defense couns- el's responsibility to assure that defendant was appraised of"**all**" his appellate rights and that trial court strictly complied with criminal rule 11. In reviewing the records on appeal,the appellate court should inquire as to whether the defendant voluntarily and knowingly waived his constitutional right(s).This inquiry intails a review of the records to ensure that criminal rule 11,was followed by the trial court upon defendant's guilty plea.State v.Kelly,57 Ohio St.3d.127,129,566 N.E.2d.658,660.Smith v.Robbins,120 S.Ct.746,772 (2000). In adsence of sentencing transcript of June 18,1997,Appellant maintains that defense counsel nor trial court in a personal oral manner informed Appellant of his appellate rights,pursuant to

Criminal Rule 11(b)(2), before, after or during sentencing. Defense counsel "did not" make a reasonable effort to protect Appellant's appellate rights either orally, directly and personally during trial court proceeding. [R]ight to appeal from conviction in state court is "not" an absolute right, but where opportunity to appeal is granted, as in Ohio, an indigent conviction defendant "cannot" be deprived of his opportunity to appeal by his impecunious condition, R.C. §2953.05, *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed. 2d. 1209. *Smith v. McMann*, 417 F.2d. 648, 654, certiorari denied, 397 U.S. 925, 90 S.Ct. 929, 90 S.Ct. 929, 25 L.Ed. 2d. 105. The Federal Constitution is violated if a convicted defendant is denied an appeal "by reason of his lack of knowledge of his right and the failure of his counsel or the court to advise him of his right to appeal, with the aid of counsel". *LaChance v. Erickson*, 522 U.S. 262, 266 (1998), *City of Cleveland Board of Education v. Loudemill*, 470 U.S. 532-542 (1985); *Goodwin v. Cardwell*, 432 F.2d. 521, 522-523 (6th Cir. 1970). [T]he indigent defendant need only "show" that he "was not" informed of his right to direct appeal. *Lovelace v. Haskins*, 474 F.2d. 1254-1255 (1973); [T.p. page 8, lines 13-25; T.p. page 9, lines 1-25; T.p. page 10, lines 1-20; T.p. page 16, lines 7-22] Over several years Appellant has attempted to get sentencing transcript of June 18, 1997; See also T.P. Image 135; T.p. 1; T.p. 2; T.p. 3. [T]he right to appeal exists even in the absence of a request. *Swenson v. Boslen*, 386 U.S. 258, at 260, 87 S.Ct. at 997, 18 L.Ed. 2d. 33.

ISSUE PRESENTED FOR REVIEW

WHEN DEFENSE COUNSEL FAILED TO PROTECT APPELLANT'S APPELLATE RIGHTS, DEFENSE COUNSEL'S ASSISTANCE WAS INEFFECTIVE AND FELL WELL BELOW REASONABLE STANDARDS, AND DENIED APPELLANT DUE PROCESS PROTECTION UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND DEFENSE COUNSEL'S MISCONDUCT ADVERSELY AFFECTED APPELLANT'S PLEA HEARING OUTCOME.

THIRD ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED AT SENTENCING, BY ALLOWING TRIAL COURT TO IMPOSE MAXIMUM SENTENCING WITH-OUT STRICTLY COMPLYING WITH SENTENCING GUIDELINES.

ARGUMENT

Defense counsel knowingly allowed trial court to impose maximum sentence on defendant with-out complying with sentencing guidelines. [Ohio] Courts as of 1996, are required to comply with the sentencing guidelines and procedures set forth under Ohio's Revised Codes §2929.11 through §2929.14(C) and R.C's §2951.02(B); §2929.12(C) with §2929.19(B)(2)(e), with trial court making and "especially enumerating" why this particular alleged offense were the "worst forms" of the offense and deserving maximum sentence. State v. Kershaw, 132 Ohio App.3d.243 (Hamilton Cty. 1991), 724 N.E.2d.1176; State v. Sheppard, (Hamilton, Cty. 1997), 124 Ohio App.3d.66; 705 N.E.2d.411; State v. Comer, 99 Ohio St.3d.463, 793 N.E.2d.473. Defendant who received maximum sentence for offense "is entitled" to de novo review of sentence by court of appeals. R.C. §2953.08(A)(a).

ISSUE PRESENTED FOR REVIEW

DEFENSE COUNSEL WAS INEFFECTIVED IN ALLOWING TRIAL COURT TO IMPOSE MAXIMUM SENTENCE WITH-OUT COMPLYING WITH SENTENCING GUIDELINES, HIS ASSISTANCE WAS "NOT" REASONABLY, AND COUNSEL'S INEFFECTIVENESS ADVERSLY AFFECTED APPELLANT'S SENTENCE, AND DENIED APPELLANT DUE PROCESS PROTECTION.

FOURTH ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED FOR ALLOWING DEFENDANT TO BE CLASSIFIED AS A SEXUAL PREDATOR WITH-OUT REQUISITE HEARING.

ARGUMENT

Defense counsel was ineffectived at plea hearing and sentencing of May 15, 1997 and June 18, 1997, when he (counsel) knowingly allowed trial court to classify defendant

a sexual predator with-out requisite hearing.[T.p.page 7,lines 1-12;T.p.page 7,lines 23-25;T.p.page 8 lines 1-14;T.p.page 10,lines 21-25;T.p.page 11,lines 1-4;T.p.page 17,lines 16-25]. Defendant was adjudicated with-out clear and convincing evidence and in absence of R.C.§2950.09(B)(1).State v.Eppinger,91 Ohio St.3d.158;743 N.E.2d.881 (2000);State v.Cook,(1998),83 Ohio St.3d.423-426.

ISSUE PRESENTED FOR REVIEW

DEFENSE COUNSEL WAS INEFFECTIVED IN FAILING TO OBJECT,WHEN TRIAL COURT FAILED TO PROVIDE APPELLANT WITH A HEARING UNDER SEXUAL PREDATOR GUIDELINES,DEFENSE COUNSEL'S ASSISTANCE WAS NOT WITHIN THE BOUNDS OF REASONABLY,AND "DID NOT"PROTECT APPELLANT'S DUE PROCESS RIGHTS UNDER R.C.§2950.09.

FIFTH ASSIGMENT OF ERROR

TRIAL COURT ABUSED ITS' DISCRETION IN SENTENCING BY NOT FORMALLY ADVISING DEFENDANT OF HIS APPELLANT RIGHTS.

ARGUMENT

Trial court abused its' discretion by not orally directly and personally informing defendant of his appellate rights during sentencing in absence of Criminal Rule 32(B)(2).Trial court transcript of May 15,1997 is silent.Trial court "did not" in an oral dialogue inform defendant of his appellate rights,which should have been personal and in a reasonably intelligible manner."[I]f one's right to direct appeal and his right to court-appointed counsel for such appeal are to be viable,it is imperative that there be such a determination of such rights by the appellate court".State v.Sims,272 N.E.2d.at 88-89(Ohio 1971);Evitts v.Lucey,469 U.S.387,393(1985);Douglas v.California,372 U.S.353,356-57(1963). The purpose of the first appeal provided as of right by a state is to determine whether the individual defendant has been "lawfully" incarcerated and to ensure a correct adjudication of guilt or innocence.

Griffin v. Illinois, 351 U.S. 12, 18 (1956). Burkett v. Cunningham, 826 F.2d 1208, 1221 (8th Cir. 1987); Stephenson, 510 F.Supp. 840, 842 (M.D.N.C. 1981). Equal protection concerns are implicated when the state treats a class of defendants differently for purpose of offering them a meaningful appeals. Evitts, 469 U.S. at 405.

ISSUE PRESENTED FOR REVIEW

TRIAL COURT ABUSED ITS' DISCRETION BY NOT ORALLY, DIRECTLY FORMALLY ADVISING APPELLANT OF HIS APPELLATE RIGHTS, TRIAL COURT'S ABUSE DENIED APPELLANT DUE PROCESS PROTECTION, AND THIS ABUSE DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL COURT PROCEEDING, AND A RIGHT TO DIRECT APPEAL.

SIXTH ASSIGNMENT OF ERROR

TRIAL COURT ABUSED ITS' DISCRETION BY NOT FORMALLY ADVISING DEFENDANT OF A HEARING AS PROVIDED BY R.C. § 2950.09(B)(1).

ARGUMENT

Trial court abused its' discretion by adjudicating defendant a sexual predator, in absence of R.C. § 2950.09(B)(1), and with evidence which was "not" clear and convincing. State v. Eppinger, 91 Ohio St.3d. 158; 743 N.E.2d. 881. "To [earn] the most severe designation of sexual predator, the defendant "must" have been convicted of or pleaded guilty to committing a sexually oriented offense and "must" be likely to engage in the future in one or more sexually oriented offenses". R.C. § 2050.01(F), State v. Cook, 83 Ohio St.3d. at 407; 700 N.E.2d. at 574. A sexual offender classification will have a profound impact on a defendant's life, it must be impartial and fair. State v. Gowdy, (2000), 88 Ohio St.3d. 387, 389; 727 N.E.2d. 579-589. The state "must", as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense when those tools are available for a price to other prisoners". Britt v. North Carolina, (1971), 404 U.S. 226, 227; 92 S.Ct. 431, 433; 30 L.Ed.2d. 400, 403.

ISSUE PRESENTED FOR REVIEW

TRIAL COURT ABUSED ITS' DISCRETION AND DENIED APPELLANT DUE PROCESS PROTECTION, BY NOT FORMALLY PROVIDING APPELLANT A SEXUAL PREDATOR HEARING, WITH CLEAR AND CONVINCING EVIDENCE BEFORE ADJUDICATING APPELLANT A SEXUAL PREDATOR.

T.p.page 5,lines 11-25;T.p.page 6,lines 1-25;T.p.page 7,lines 1-12;T.p.page 7,lines 23-25;T.p.page 8,lines 1-14;T.p.page 17,lines 16-25].

C O N C L U S I O N

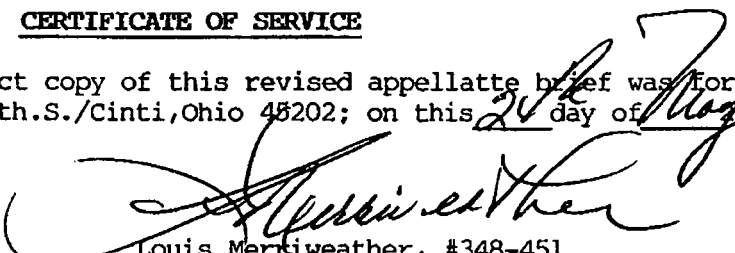
The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense, the right to counsel is the right to effective assistance of counsel with adequate legal assistance. In Strickland v. Washington, [passim] at 2074-2075, Justice Marshall dissented and filed this opinion in part "to tell lawyers and the lower courts that counsel for a criminal defendant "must" behave "reasonably" and must act like "a reasonable competent attorney", .ante, at 2065, "is to tell them nothing". It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who in turn, has limited time and resources to devote to a given case. [I]s a reasonably competent attorney, a reasonably competent adequately paid retained attorney or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by local"? [A]ppellant maintains that in absence of proper procedure and in strict violation of Ohio's and the U.S. Constitutions, Appellant was sold into "involuntary servitude/slavery" to the state of Ohio for 10 years for the tune of \$300.00 dollars.

In 1865, the thirteenth Amendment was adopted which, ["prohibits slavery and involuntary servitude], the Fourteenth Amendment "extended the privileges of citizenship to "African Americans" and forbids the states from "abridging" the privileges or immunities of citizens of the United States, it also forbids the states from depriving any person of life, liberty, or property without "due process of law", or of denying any person the equal protection of the law. In the instance case at bar "three" [3] laws are in conflict, the laws of Hamilton County, the Ohio and the U.S. Constitution, Hamilton County's laws have illegally kept Appellant in involuntary servitude to the state of Ohio against Appellant's will and deliberately denied Appellant due process protection. For 7^{1/2} years Appellant has been imprisoned under infirm conditions, with undue mental and physical pressure imposed against him, without the benefit of due process protection and still with the strong belief in the American justice system which has tho so far failed him". Appellant has been delieratley denied the personal privileges of his loved ones', his family "structure" has been broken, his family members have suffered the personal humiliation with mental and physical pain from Appellant's wrongful incarceration. Delayed justice must not continue to incarcerate Appellant without due process of law.

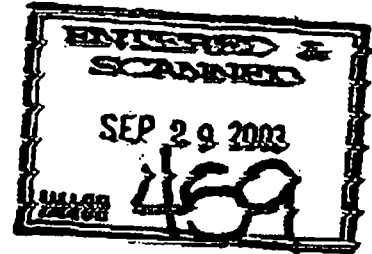
It is therefore prays that delayed justice be granted Appellant.

CERTIFICATE OF SERVICE

I hereby certify that a correct copy of this revised appellatte brief was forward to Michael K. Allen, at 230 E. 9th. S. / Cinti, Ohio 45202; on this 20th day of May 2004 by per-paid first class mail.


Louis Merriweather, #348-451
P.O. Box 5500
Chillicothe, Ohio 45601-0990

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**



STATE OF OHIO,

Plaintiff

vs.

LOUIS MERRIWEATHER,

Defendant.

Case No. B9702196

Judge Beth A. Myers

ENTRY DENYING MOTION

Upon consideration of Defendant's Motion, the Court hereby denies Defendant's Motion and his request for evidentiary hearing. Pursuant to § 2953.21 and 2953.33 of the Ohio Revised Code, Defendant's Motion was not timely filed. Further, the Court finds that no grounds exist for the relief requested.

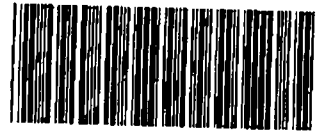
Beth A. Myers
Judge Beth A. Myers

ENTER

SEP 29 2003

BETH A. MYERS, JUDGE

**COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO**



D60782773

STATE OF OHIO

NO. C-030948

Plaintiff-Appellee

Trial Court Case No. B-9702196

vs.

LOUIS MERRIWEATHER

Defendant-Appellant

BRIEF OF PLAINTIFF-APPELLEE

Michael K. Allen (0025214P)
Prosecuting Attorney

Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3012
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE

**FILED
COURT OF APPEALS**

SEP 21 2004

**GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY**

Louis Merriweather #348-451
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, Ohio 45601-0990

DEFENDANT-APPELLANT, PRO SE

CLERK OF COURTS

SEP 22 2004

RECEIVED

**LOUIS MERRIWEATHER
DEFENDANT-APPELLANT
CLERK OF COURTS
HAMILTON COUNTY, OHIO**

SEP 21 2 45 PM 2004

FILED

H

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE

- a) Procedural Posture: 1.
- b) Statement of Facts: 1.

FIRST ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED, WHEN HE ALLOWED TRIAL COURT TO SENTENCE APPELLANT WITH-OUT PRESENTENCE INVESTIGATIVE REPORT (PSI) AND PSYCHIATRIC EVALUATION (PE). 2.

SECOND ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED, WHEN HE FAILED TO PROTECT DEFENDANT'S APPELLATE RIGHTS. 2.

THIRD ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING BY ALLOWING TRIAL COURT TO IMPOSE MAXIMUM SENTENCING WITHOUT COMPLYING WITH SENTENCING GUIDELINES. 2.

FOURTH ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED FOR ALLOWING DEFENDANT TO BE CLASSIFIED A SEXUAL PREDATOR WITHOUT REQUISITE HEARING. 2.

FIFTH ASSIGNMENT OF ERROR

TRIAL COURT ABUSED IT'S DISCRETION IN SENTENCING BY NOT FORMALLY ADVISING DEFENDANT OF HIS APPELLATE RIGHTS. 2.

SIXTH ASSIGNMENT OF ERROR

TRIAL COURT ABUSED IT'S DISCRETION BY NOT FORMALLY ADVISING DEFENDANT OF A HEARING AS PROVIDED BY R.C. 2950.09(B)(1). 2.

[ARGUED TOGETHER]

TABLE OF CONTENTS (Cont'd)**PAGE****ISSUE PRESENTED FOR REVIEW AND ARGUMENT**

Ohio Rev. Code Ann. § 2953.23 closely circumscribes the jurisdiction of a common pleas court to entertain a tardy or successive postconviction petition: the petitioner must show either that he was unavoidably prevented from discovering the facts upon which his petition depends, or that his claim is predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the expiration of the time prescribed in Ohio Rev. Code Ann. § 2953.21(A)(2) or since the filing of his last petition; and he must show by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted. Ohio Rev. Code Ann. § 2953.23(A). 3.

AUTHORITIES CITED:

R.C. 2953.21(A)(2) 3.
 R.C. 2953.23 3.
 R.C. 2953.23(A) 4.
State v. Sanders, 2002 Ohio 5093, *, 2002 Ohio App. LEXIS 5180, ** 4.

CONCLUSION 4.

CERTIFICATE OF SERVICE 4.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

STATE OF OHIO : NO. C-030948

Plaintiff-Appellee :

vs. :

BRIEF OF PLAINTIFF-APPELLEE

LOUIS MERRIWEATHER :

Defendant-Appellant :

STATEMENT OF THE CASE

a) Procedural Posture:

On May 15, 1997, defendant plead guilty to two counts of rape. On June 18, 1997, defendant was sentenced to the Department of Corrections for ten years. Defendant did not timely appeal this judgment. Defendant did not file timely for post-conviction relief.

On September 9, 2003, defendant filed a petition for post-conviction relief. By entry of September 29, 2003, the trial court denied the petition as untimely. This appeal ensued.

b) Statement of Facts:

In his September 9, 2003 petition entitled, "Motion for Evidentiary Hearing Pursuant to R.C. 2953.22," defendant made no attempt to explain or justify the tardiness of his petition. The trial court noted the tardiness of the petition and found that no grounds existed to grant defendant the relief requested.

FIRST ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED, WHEN HE ALLOWED TRIAL COURT TO SENTENCE APPELLANT WITH-OUT PRESENTENCE INVESTIGATIVE REPORT (PSI) AND PSYCHIATRIC EVALUATION (PE).

SECOND ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED, WHEN HE FAILED TO PROTECT DEFENDANT'S APPELLATE RIGHTS.

THIRD ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING BY ALLOWING TRIAL COURT TO IMPOSE MAXIMUM SENTENCING WITHOUT COMPLYING WITH SENTENCING GUIDELINES.

FOURTH ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVED FOR ALLOWING DEFENDANT TO BE CLASSIFIED A SEXUAL PREDATOR WITHOUT REQUISITE HEARING.

FIFTH ASSIGNMENT OF ERROR

TRIAL COURT ABUSED IT'S DISCRETION IN SENTENCING BY NOT FORMALLY ADVISING DEFENDANT OF HIS APPELLATE RIGHTS.

SIXTH ASSIGNMENT OF ERROR

TRIAL COURT ABUSED IT'S DISCRETION BY NOT FORMALLY ADVISING DEFENDANT OF A HEARING AS PROVIDED BY R.C. 2950.09(B)(1).

[ARGUED TOGETHER]

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Ohio Rev. Code Ann. § 2953.23 closely circumscribes the jurisdiction of a common pleas court to entertain a tardy or successive postconviction petition: the petitioner must show either that he was unavoidably prevented from discovering the facts upon which his petition depends, or that his claim is predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the expiration of the time prescribed in Ohio Rev. Code Ann. § 2953.21(A)(2) or since the filing of his last petition; and he must show by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted. Ohio Rev. Code Ann. § 2953.23(A).

ARGUMENT

R.C. 2953.21(A)(2) provides:

(2) A petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

R.C. 2953.23 closely circumscribes the jurisdiction of a common pleas court to entertain a tardy or successive postconviction petition: The petitioner must show either that he was unavoidably prevented from discovering the facts upon which his petition depends, or that his claim is predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the expiration of the time prescribed in R.C. 2953.21(A)(2) or since the filing of his last petition; and he must show “by clear and convincing evidence that, but for constitutional

error at trial, no reasonable factfinder would have found (him) guilty of the offense of which (he) was convicted."¹


Here, the trial court properly declined to entertain defendant's tardy petition because the record does not demonstrate either that he was unavoidably prevented from discovering the facts underlying his claims or that his claims were predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the filing of his first petition.

CONCLUSION

The judgment of the trial court is properly affirmed.

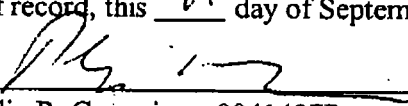
Respectfully,

Michael K. Allen, 0025214P
Prosecuting Attorney


Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3012
Attorneys for Plaintiff-Appellee

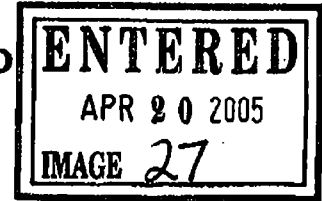
CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Brief of Plaintiff-Appellee, by United States mail, addressed to Louis Merriweather #348-451, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601-0990, counsel of record, this 21 day of September, 2004.


Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney

¹ R.C. 2953.23(A); see also, State v. Sanders, 2002 Ohio 5093, *, 2002 Ohio App. LEXIS 5180, **.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO,

Plaintiff-Appellee,

vs.

LOUIS MERRIWEATHER,

Defendant-Appellant.

APPEAL NO. C-030948

TRIAL NO. B-9702196

JUDGMENT ENTRY.

This appeal is considered on the accelerated calendar under App.R. 11.1(E) and Loc.R. 12, and this Judgment Entry shall not be considered an Opinion of the Court pursuant to S.Ct.R.Rep.Op. 3(A).

Defendant-appellant, Louis Merriweather, appeals from the trial court's judgment dismissing his petition for postconviction relief. The record shows that the court entered a judgment of conviction in 1997. His petition for postconviction relief was filed on September 9, 2003.

Merriweather raises six assignments of error in which he cites various alleged errors including ineffective assistance of counsel, improper sentencing, and improprieties in a sexual-predator hearing. We need not discuss the merits of these assignments of error. Because Merriweather's petition was not filed within the time limits set forth in R.C. 2953.21(A)(2), the trial court properly dismissed his petition as untimely. See *State v.*



OHIO FIRST DISTRICT COURT OF APPEALS

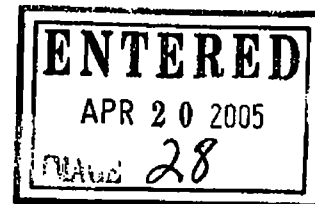
Beaver (1998), 131 Ohio App.3d 458, 722 N.E.2d 1046; *State v. Tatum*, 1st Dist. No. C-040296, 2005-Ohio-903.

Further, Merriweather has not demonstrated that he fell within one of the two exceptions set forth in the statute. He has not shown that he was unavoidably prevented from discovering the facts upon which the petition depended or that his claim was predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the expiration of the time prescribed in R.C. 2953.21(A)(2). R.C. 2953.23(A)(1)(a); *Beaver*, supra; *Tatum*

Merriweather raises sentencing issues, and, arguably, *Blakely v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 2531, and *United States v. Booker* (2005), ___ U.S. ___, 125 S.Ct. 738, set forth an applicable federal or state right. Nevertheless, those cases apply to "all cases on direct review or not yet final." *State v. Bruce*, 1st Dist. No. C-040421, 2005-Ohio-373. They do not apply retroactively to cases on collateral review. *Humphress v. United States* (C.A.6, 2005), 398 F.3d 855; *Green v. United States* (C.A.2, 2005), 397 F.3d 101. Consequently, we overrule Merriweather's six assignments of error and affirm the trial court's judgment.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DOAN, P.J., GORMAN and PAINTER, JJ.



To the Clerk:

Enter upon the Journal of the Court on April 20, 2005

per order of the Court

Stephen J. Doan
Presiding Judge *md*

ORIGINAL

MSF of Louis Merriweather (AWT)
AND MSF (AWT)

ON COMPUTER - CMM

NOTICE OF APPEAL FROM A COURT OF APPEALS
IN THE SUPREME COURT OF OHIO

05-0904

Louis Merriweather,
Appellant,
V.
State of Ohio
Appellee,

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District
Appellate District

Court of Appeals
Case No.C-030948

NOTICE OF APPEAL OF APPELLANT LOUIS MERRIWEATHER

Louis Merriweather, #336-451
In Pro Se
P.O.Box 5500
Chillicothe, Ohio 45601-0990

Pro Se

Philip R. Cummings, (0041497P)
Assistant Prosecuting Attorney
230 E.9th St, Suite #4000
Cincinnati, Ohio 54202

COUNSEL FOR APPELLEE, HAMILTON
COUNTY, OHIO, CITY OF CINCINNATI

FILED

MAY 16 2005

MARCIA J MENGEL, CLERK
SUPREME COURT OF OH

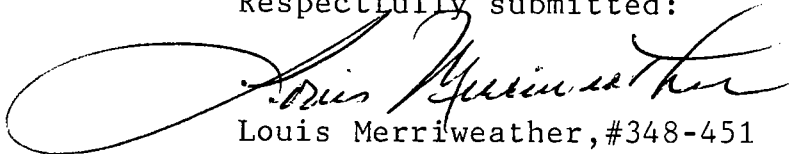
J

Notice of Appeal of Appellant Louis Merriweather

Appellant Louis Merriweather hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in the Court of Appeals case No. C-030948 on April 20th, 2005.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted:



Louis Merriweather, #348-451

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Philip R. Cummings Hamilton County Asst. Prosecutor at 230 E. 9th. St, Suite #400, Cincinnati, Oh. 45202 on this 11th day of May 2005.



Louis Merriweather, In pro se.

Page

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONTINUITIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW Proposition of Law No.1:Complying with statutory sentencing guidelines R.C.'s §2929.11 through §2929.14(A)(1), (C).....	2
CONCLUSION.....	4
PROOF OF SERVICE.....	4
APPENDIX.....	5
OPINION AND JUDGMENT OF HAMILTON COUNTY FIRST DIST.COURT OF COURT OF APPEALS APRIL 20,2005.....Appx.Pg.....	2
QUESTION OF UNCERTIFIED UNWITNESS TRANSCRIPT.....	4

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause present 3 very critical issue for the furtuer of public interest on State court's strict compliance with statutory guidelines;(1) whether the Common pleas trial court in felony sentencing must strictly comply with statutory sentencing guidelines;(2)whether a state trial court can increase a sentence beyond the statutory maximum sentence without strict compliance,in violation of the Sixth Amendment?

STATEMENT OF THE CASE AND FACTS

Appellant was restrained of his liberties on March 23,1997 at 1535 Pleasant St.Cincinnati,Oh.Hamilton County,on an alleged verbal complaint from the alleged victim's cousin.Appellant was interview while under drugs then placed in the Hamilton County Justice Center,there appellant was immediately placed on suicide watch.Appellant was indicted on 4 counts of rape in violation of R.C.§2907.02 (A)(1)(b) without the elements of "force".Appellant was diagnosed with suffering from Post-Traumatic-Syndrome (PTSD) and anti-psychotorpic medication was issued through all of appellant's trial court proceeding.Under these medications defense counsel coerced appellant into pleading guilty to 2 counts of rape on the condition that the state would dismiss counts 3&4.These guilty pleas were without benefit of discovery.

.During trial court sentencing on June 18,1997,the court imposed the maximum sentence of ten years without strictly complying with statutory guidelines.The trial court states on the record "tell your attorney if you want to appeal".Defense counsel failed to file a timely notice of appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No.1:Complying With statutory Sentencing Guidelines R.C.'s §2929.11 through 2929.14(A)(1)&(C).

In this case at bar appellant,during trial court proceeding was heavily medicated and sentence to maximum term on coerced guilty plea to 2 counts of rape in violation of R.C.§2907.02(A)(1)(b) without the elements of "force" and on condition that the court would dismiss counts 3&4 of the indictment.June 18,1997 trial court accepted appellant guilty pleas and imposed maximum sentence of ten years.The sentencing range for 1st degree felony term from 3-10 years.[O]hio Courts as of 1996,are required to strictly comply with statutory sentencing guidelines and procedures set forth under Ohio Revised Codes §2929.11 through §2929.14(A)(1),&(C)plus §2929.14(E).Under Ohio's sentencing guidelines the maximum is reserved for those offenders who had committed the "worst form" of the offenses or pose the greatest likelihood of recidivism.State v.Kershaw,132 Ohio App.3d.343,(Hamilton Cty,1991),724 NE2d.1176;State v.Sheppard,(Hamilton Cty,1997),124 Ohio 66,705 NE2d.411;State v.Comer,99 Ohio St.3d.463,793 NE2d.473;State v.Bell,1st Dist.No.030726-2004-Ohio-3621;State v.Burce,1st Dist.No.040421-2005-Ohio-373.

In light of recent United States Supreme Court Ruling, the 1st Dist. Court of appeals should not have overruled appellant issue of maximum sentencing which became a substantial right, when in State v. Montgomery-2005-Ohio-1018, the 1st Dist. ruled "As it stand now trial courts' imposition of maximum sentence of ten years was prohibited by the Sixth Amendment on the imposition of the longest term of imprisonment, therefore R.C.'s §2929.14(A)(1) and §2929.14(C) are unconstitutional to the extent that they permit a sentencing court to impose a sentence exceeding the maximum term authorized by the facts and admitted by the defendant or proven to a jury beyond a reasonable doubt". The 1st Dist., with their own ruling still refused to address appellant's issue of wrongful and unlawful sentence, which the United States Supreme Court in *Brooker*, (2005), 125 S.Ct. 738, 160 L.Ed.2d. 621; Ruled as "plain error".

"[N]ew substantial rules generally apply retroactively, this include decisions that narrow the scope of a criminal statute by interpreting it terms, as well as constitutional determination that place particular conduct or persons covered by a statute beyond the state's power to punish; for retroactivity purpose, a rule is substantive rather than procedural if it alters the range of conduct of the class of person's that the law punishes, such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that he does not make criminal" or faces a punishment that the law cannot impose upon him.

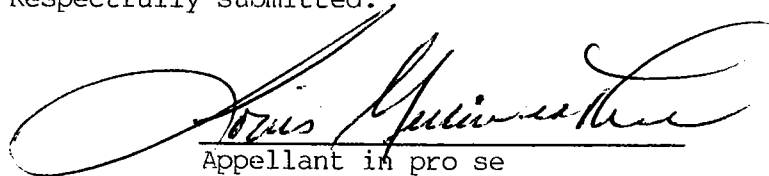
Bousley v. United States, 523 U.S. 614, 620, 198 S.Ct. 1604, (quoting *Davis v. U.S.* 333, 346, 94 S.Ct. 2298, 41 L.Ed. 109, (1974), See also, *Schriro v. Summerlin*, 124 S.Ct. 2519, (2004); *State v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d. 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d. 334, (1989).

3. Is it proper for a Appellate court of appeals to accept a noncertified and unwitness alleged trial court sentencing transcript as accurate in violation of Appellate R.9(B)(8)?

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and substantial constitutional questions. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted:


Appellant in pro se

CERTIFICATE OF SERVICE

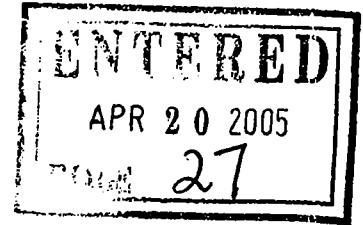
I certify that a true and correct copy of this notice of appeal and memorandum was sent by ordinary U.S. mail to counsel of appellee, Philip R. Cummings, at 230 E. 9th. St., Suite # 400, Cincinnati, Oh. 45202, on this 13 day of May 2005.


Louis Merriweather, #348-451



D63398375

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO,

APPEAL NO. C-030948

TRIAL NO. B-9702196 ✓

Plaintiff-Appellee,

JUDGMENT ENTRY.

vs.

LOUIS MERRIWEATHER, 348-451

RECEIVED

Defendant-Appellant.

MAY 02 2005

COI RECORD OFFICE

This appeal is considered on the accelerated calendar under App.R. 11.1(E) and Loc.R. 12, and this Judgment Entry shall not be considered an Opinion of the Court pursuant to S.Ct.R.Rep.Op. 3(A).

Defendant-appellant, Louis Merriweather, appeals from the trial court's judgment dismissing his petition for postconviction relief. The record shows that the court entered a judgment of conviction in 1997. His petition for postconviction relief was filed on September 9, 2003.

Merriweather raises six assignments of error in which he cites various alleged errors including ineffective assistance of counsel, improper sentencing, and improprieties in a sexual-predator hearing. We need not discuss the merits of these assignments of error. Because Merriweather's petition was not filed within the time limits set forth in R.C. 2953.21(A)(2), the trial court properly dismissed his petition as untimely. See *State v.*

Chillicothe - A 348451

OHIO FIRST DISTRICT COURT OF APPEALS

Beaver (1998), 131 Ohio App.3d 458, 722 N.E.2d 1046; *State v. Tatum*, 1st Dist. No. C-040296, 2005-Ohio-903.

Further, Merriweather has not demonstrated that he fell within one of the two exceptions set forth in the statute. He has not shown that he was unavoidably prevented from discovering the facts upon which the petition depended or that his claim was predicated upon a new or retrospectively applicable federal or state right recognized by the United States Supreme Court since the expiration of the time prescribed in R.C. 2953.21(A)(2). R.C. 2953.23(A)(1)(a); *Beaver*, supra; *Tatum*

Merriweather raises sentencing issues, and, arguably, *Blakely v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 2531, and *United States v. Booker* (2005), ___ U.S. ___, 125 S.Ct. 738, set forth an applicable federal or state right. Nevertheless, those cases apply to "all cases on direct review or not yet final." *State v. Bruce*, 1st Dist. No. C-040421, 2005-Ohio-373. They do not apply retroactively to cases on collateral review. *Humphress v. United States* (C.A.6, 2005), 398 F.3d 855; *Green v. United States* (C.A.2, 2005), 397 F.3d 101. Consequently, we overrule Merriweather's six assignments of error and affirm the trial court's judgment.

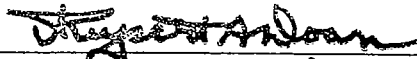
Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DOAN, P.J., GORMAN and PAINTER, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 20, 2005

per order of the Court


Presiding Judge 